

ARKANSAS COURT OF APPEALS  
NOT DESIGNATED FOR PUBLICATION  
JOSEPHINE LINKER HART, JUDGE

DIVISION I

CA06-807

February 28, 2007

BYARS CONSTRUCTION  
COMPANY, L.L.C.  
APPELLANT

v.

P&C MANAGEMENT AND  
CONSTRUCTION, L.L.C., LE VAN  
DANG and TUYETNGA T. DANG  
APPELLEES

AN APPEAL FROM JEFFERSON COUNTY  
CIRCUIT COURT  
[No. CV2004-87-1]

HONORABLE BERLIN JONES,  
CIRCUIT JUDGE

REVERSED and REMANDED

This appeal is brought from an order dismissing the complaint of appellant Byars Construction Company, LLC, against appellees P&C Management and Construction, LLC, and Le Van and Tuyetnga Dang. We dismissed the first appeal in this case because the order appealed from did not dispose of all of the claims filed by the parties and did not contain an Ark. R. Civ. P. 54(b) certificate. *Byars Constr. Co. v. P&C Mgmt. & Constr.*, No. CA05-1237 (Ark. App. May 3, 2006) (not designated for publication). That deficiency has now been corrected, and Byars raises three points on appeal. We find merit in Byars's first point and reverse and remand for further proceedings without reaching the other points.

On February 5, 2004, Byars filed a complaint against P&C Management and the Dangs to foreclose on a lien. The complaint alleged that P&C, as general contractor, and the Dangs, as property owners, had hired Byars to do the carpentry and frame work on a 7,141-square-foot residence. According to Byars, its work was ninety-five percent complete and it had received all but \$11,742.32 of the amount due it when P&C hired another crew to complete the job. Byars asserted a lien on the property and sought judgment for that amount. The complaint also alleged that Byars served the statutory notices on both P&C and the Dangs.

P&C and the Dangs each filed answers to Byars's complaint, asserting, among other things, that the complaint failed to state facts upon which relief could be granted, along with individual counterclaims. P&C's counterclaim sought judgment against Byars for \$5,754, alleging that, as a result of Byars's failure to timely or satisfactorily complete the job, P&C was required to hire another crew and expend money over and above the contract price. The Dangs' counterclaim sought an unspecified amount of compensatory and punitive damages against Byars for slander of title. Byars filed a cross-claim against P&C for judgment in the event the Dangs were successful on their counterclaim.

By order entered September 12, 2005, the trial court dismissed Byars's complaint, ruling that Byars had neither adequately pled entitlement to the lien nor provided the Dangs with the lien notice required by Ark. Code Ann. § 18-44-115 (Supp. 2005). Byars appealed, but this court dismissed the first appeal because the record did not reflect that P&C's or the Dangs' counterclaims were dismissed or otherwise resolved. On remand, the trial court

entered an order dismissing Byars's complaint and further certifying the case for appeal in accordance with Rule 54(b). Byars timely filed its notice of appeal.

In reviewing a dismissal order pursuant to Ark. R. Civ. P. 12(b)(6), we treat the facts alleged in the complaint as true and view them in the light most favorable to the plaintiff. *Branscumb v. Freeman*, 360 Ark. 171, 200 S.W.3d 411 (2004). In viewing the facts in the light most favorable to the plaintiff, the facts should be liberally construed in plaintiff's favor. *Id.* We look to the underlying facts supporting an alleged cause of action to determine whether the matter has been sufficiently pled. *Clayborn v. Bankers Standard Ins. Co.*, 348 Ark. 557, 75 S.W.3d 174 (2002).

Byars first argues that its complaint, as amended, stated facts sufficient to allege a cause of action against both P&C and the Dangs. The trial court relied on two grounds in dismissing Byars's complaint: first, that the complaint failed to differentiate between the amount owed for work Byars had already completed and the amount owed to Byars as the benefit of its bargain; and second, that the complaint failed to allege that proper notice of the lien was given. We will discuss the two grounds in reverse order.

Our materialmen's lien statutes, in Ark. Code Ann. §§ 18-44-114 and 18-44-115, provide two separate notice provisions. *Books-A-Million, Inc. v. Arkansas Painting & Specialties Co.*, 340 Ark. 467, 10 S.W.3d 857 (2000). Both notices are required. *Id.* In its complaint, Byars alleged that it "caused statutory notices to be timely and duly served upon all defendants listed un [sic] paragraph 1 above statutory notices of its intent to file a lien against the above described lands..." Attached to the complaint were lien notices addressed

to P&C and each of the Dangs, as well as affidavits purporting to show service of the notices. In the various amendments to the complaint, Byars asserted that no notice was required because the Dangs were either controlling and directing the work or acting as the prime contractor. However, in each amendment, Byars also asserted that it had sent the proper notices in a timely manner. We must take these allegations as true for purposes of these motions. *Branscumb, supra*. Because it was alleged that notice was given, it is irrelevant whether the Dangs were acting as the contractor, thus excusing the notice requirement. It is also irrelevant at this point in the proceedings whether the Dangs actually received the notices. The issue of whether the Dangs received the notices is not implicated in a Rule 12(b)(6) motion; that is an issue of proof for a later stage of the proceedings. Therefore, the trial court was in error in dismissing Byars's complaint for failure to allege that notice was given.

The trial court also based its dismissal of Byars's complaint on the fact that the complaint did not differentiate between the amount of money owed for work Byars had performed and the total amount owed to Byars as the benefit of its bargain. In other words, the trial court dismissed the complaint because Byars was seeking a lien for work that it had not performed. Thus, the trial court recognized that there were two distinct issues — the amount of money Byars was owed and the extent of its lien. However, the trial court appears to have conflated those issues in deciding the motion to dismiss.

This court has recognized that a materialmen's lien extends only to the labor and materials actually used in the construction project. *Hickman v. Kralicek Realty & Constr.*

Co., 84 Ark. App. 61, 129 S.W.3d 317 (2003); *Del Mack Constr., Inc. v. Owens*, 82 Ark. App. 415, 118 S.W.3d 581 (2003). However, that does not prevent the contractor from seeking judgment for the full amount owed to the contractor. *Hickman, supra*. It also does not mean that a complaint seeking the full amount owed fails to state a cause of action, which is what a Rule 12(b)(6) motion is designed to test. *Perry v. Baptist Health*, 358 Ark. 238, 189 S.W.3d 54 (2004). In *Hickman*, this court held that, although a materialmen's lien did not extend to cover a contractor's profit, the contractor could nevertheless seek the full amount it was owed.

The facts, as pled by the amendments to the complaint, are as follows. P&C, as the subcontractor in charge of the framing work, and the Dangs, as property owners, had hired Byars to do the carpentry and frame work on a 7,141-square-foot residence. The contract price was \$42,846, plus the costs of Byars's nails. Byars had completed ninety-five percent of the work when P&C, through its agent Wong "Sonny" Ha, fired Byars from the job, thereby breaching the contract. Byars alleged that it had received all but \$11,742.32 of the amount due. It therefore asserted a lien on the property and sought judgment for that amount. These allegations are sufficient to survive a Rule 12(b)(6) motion to dismiss because, generally, in order to state a cause of action for breach of contract the complaint need only assert the existence of a valid and enforceable contract between the plaintiff and defendant, the obligation of defendant thereunder, a violation by the defendant, and damages resulting to plaintiff from the breach. *Perry, supra*. A proper resolution of a Rule 12(b)(6) motion does not involve a trial court's consideration of the merits of a case. *Speights v. Stewart Title*

*Guar. Co., Inc.*, 358 Ark. 59, 186 S.W.3d 715 (2004). Therefore, the trial court erred in dismissing Byars's complaint on the basis that it was claiming a lien for work it did not perform.

We reverse the trial court's dismissal of Byars's complaint and remand for further proceedings.

Reversed and remanded.

PITTMAN, C.J., and BIRD, J., agree.